147

(2)

No. 09-239

Supreme Court, U.S.
FILED
DEC 3 - 2009
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

JOSH A. ALLEN,

*Petitioner,*

v.

STATE OF MONTANA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Montana**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE BULLOCK
Attorney General of Montana
CHRIS D. TWEETEN
Chief Civil Counsel
MARK W. MATTIOLI
Appellate Bureau Chief
*Counsel of Record*
STATE OF MONTANA
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

## ISSUES PRESENTED

Although framed differently by Petitioner, Allen's Petition asks this Court to grant a writ of certiorari to review three issues, which the Respondent has restated as follows:

1. Whether the Montana Supreme Court's determination that Allen did not face a real or reasonable danger of incrimination is consistent with *Hiibel v. Sixth Jud. Dist. Ct. of Nevada*, 542 U.S. 177 (2004).

2. Whether Allen's referencing distinguishable Ninth Circuit precedent satisfied his burden of proving that his rights of equal protection or due process were violated when Allen declined to affirm to testify truthfully.

3. Whether Allen's reliance upon *Brown v. Texas*, 443 U.S. 47 (1979) and *Kolender v. Lawson*, 461 U.S. 352 (1983) rebutted the presumption of constitutionality accorded Montana's obstructing a peace officer statute.

TABLE OF CONTENTS


| | Page |
|---|---|
| ISSUES PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iv |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 1 |
| I. JUSTICE COURT PROCEEDINGS | 6 |
| II. DISTRICT COURT PROCEEDINGS | 7 |
| III. MONTANA SUPREME COURT APPEAL | 12 |
| IV. ALLEN'S PETITION FOR CERTIORARI | 13 |
| SUMMARY OF REASONS TO DENY A WRIT OF CERTIORARI | 14 |
| I. THE MONTANA SUPREME COURT'S DECISION COMPORTS WITH *HIIBEL* | 16 |
| A. The Court Correctly Concluded That Requiring Allen to Provide His Name Did Not Involve a Real or Reasonable Danger of Incrimination | 16 |
| B. Citizens Who Knowingly Provoke Law-Enforcement Investigations, Intending to Refuse to Identify Themselves, Are Not a Burgeoning National Problem About Which State and Federal Courts Need Guidance | 20 |

TABLE OF CONTENTS – Continued

Page

C. Placing Allen in Handcuffs on the Ground Did Not Change the *Terry* Stop Into an Arrest. Allen Was Not Under Arrest and Asking Him to Provide His Name Was Not Reasonably Likely to Elicit an Incriminating Response in Any Event ..... 21

II. THE COURT SHOULD NOT GRANT THE WRIT TO REVIEW THE MONTANA SUPREME COURT'S DETERMINATION REGARDING ALLEN'S REFUSAL TO AFFIRM TO TELL THE TRUTH ..... 24

III. ALLEN FAILED TO CARRY HIS BURDEN OF PROVING THAT MONTANA'S OBSTRUCTING A PEACE OFFICER STATUTE IS UNCONSTITUTIONALLY VAGUE... 26

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

Page

CASES

*Berkemer v. McCarty*, 468 U.S. 420 (1984).....21

*Brown v. Texas*, 443 U.S. 47 (1979).....10, 16, 27

*Dunaway v. New York*, 442 U.S. 200 (1979) .....22

*Florida v. Royer*, 460 U.S. 491 (1983) .....22

*Golphin v. State*, 945 So. 2d 1174 (Fla. 2006).....20

*Gordon v. Idaho*, 778 F.2d 1397 (9th Cir. 1985) .....15, 24, 25

*Graham v. Connor*, 490 U.S. 386 (1989).....23

*Hiibel v. Sixth Jud. Dist. Ct. of Nevada*, 542 U.S. 177 (2004).....*passim*

*Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982).....26, 27

*Hoffman v. United States*, 341 U.S. 479 (1951) .....18, 19

*Kastigar v. United States*, 406 U.S. 441 (1972).....18

*Kolender v. Lawson*, 461 U.S. 352 (1983) .....10, 27

*Miranda v. Arizona*, 384 U.S. 436 (1966) .....23

*Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).....27

*Rhode Island v. Innis*, 446 U.S. 291 (1980) .....23

*State v. Allen*, 2009 MT 90N .....*passim*

*Terry v. Ohio*, 392 U.S. 1 (1969) .....*passim*

*United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005) .....23

TABLE OF AUTHORITIES – Continued

Page

*United States v. Dykes*, 406 F.3d 717 (D.C. Cir. 2005) ..... 23

*United States v. Henderson*, 463 F.3d 27 (1st Cir. 2006) ..... 20

*United States v. Sharpe*, 470 U.S. 675 (1985) ..... 22

FEDERAL MATERIALS

Supreme Court Rules
Rule 10 ..... 20

United States Code
Tit. 28, § 1257(a) ..... 1

United States Constitution
Amend. IV ..... 14
Amend. V ..... *passim*

MONTANA MATERIALS

Montana Code Annotated
§ 45-7-302 ..... *passim*
§ 46-5-401 ..... 1, 8, 28, 29
§ 46-17-311(1) ..... 7
§ 61-8-711(3) ..... 17
§ 61-8-725(2) ..... 17

Montana Rules of Evidence
Rule 603 ..... 11, 13

## JURISDICTION

Allen's Fifth Amendment self-incrimination claim and his due process and equal protection claims fall within the Court's jurisdiction under 28 U.S.C. § 1257(a) because they assert rights or privileges arising under the Constitution of the United States. Allen's vagueness challenge draws into question whether a state statute is repugnant to the Constitution. *Id.*

## STATUTORY PROVISIONS INVOLVED

This case involves the application of Mont. Code Ann. §§ 45-7-302 and 46-5-401. These statutes are set forth verbatim at R. App. 1-2.

## STATEMENT OF THE CASE

Hill County Deputy Sheriff Cory Matkin (Deputy Matkin) was patrolling downtown Havre at 2:15 a.m. on a Thursday morning in March 2007, when he noticed Petitioner Josh A. Allen (Allen) walking in a southwesterly direction. 3/3/08 Tr. at 7. After turning left onto Fourth Avenue West – a route the deputy had already intended to take – Deputy Matkin observed Allen duck down behind a hedgerow and then duck out of sight and run east behind the northwest corner of an ophthalmology clinic building. He then made a right-hand turn around the northeast corner of the building and ran south. After

rounding the southeast corner of the building, Allen continued running down an alley westbound. The man was running "as hard as he could. . . ." 3/3/08 Tr. at 7-9, 16:12-15; 3/27/09 Tr. at 7-8. Order Den. Mot. to Dismiss, P. App. 10, FF 2; *State v. Allen*, 2009 MT 90N, ¶ 3, P. App. 2.

Deputy Matkin emphasized that Allen ducked "downward" and "[o]ut of sight[.]" 3/3/08 Tr. at 16:21-25, 17. The deputy saw that Allen was obviously trying to avoid detection because he was running in full flight away from Matkin's patrol vehicle. 3/3/08 Tr. at 17-18, 19:6-9. With 12 years experience in the field, training at the Montana Law Enforcement Academy, and 400 additional hours of advanced training, Deputy Matkin concluded this conduct was "[a]bsolutely" suspicious:

> It was very evident to me that he was trying to evade me, for some reason. I – usually when people are trying to evade law enforcement they are either a wanted person, be it a person with a warrant or a person on probation not supposed to be drinking, not supposed to be out at this hour, at 2:15 in the morning, a person on court conditions, a wanted fugitive. It could be a person that was in the process of committing a crime, had just committed a crime, was going to be committing a crime.
>
> Again, based on my experience, this person was actively trying to evade me and I felt that that warranted a contact stop to identify

> him and to determine what exactly it was that he was up to.

3/3/08 Tr. at 8:18-25, 9:1-9, 20:12-17; *Allen*, ¶ 3, P. App. 2. The Montana trial court, P. App. 15, and the Montana Supreme Court, P. App. 5, found that Deputy Matkin had sufficient particularized suspicion to conduct a stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1969). Allen does not seek review of those findings in this Court.

Deputy Matkin caught up to Allen, activated his siren, requested him to get on the ground and placed him in handcuffs. Deputy Matkin took the latter action because "when people are fleeing from law enforcement, they also tend to be combative. It's very rare that we get engaged in a foot pursuit and not end up in some sort of wrestling match at the end of the foot pursuit." It was "an officer safety issue." 3/3/08 Tr. at 9:1, 10:1-17; Order Den. Mot. to Dismiss, FF 4, P. App. 11; *Allen*, ¶ 4, P. App. 2-3.

Deputy Matkin asked Allen why he was running. Allen responded by asking whether he was being detained or whether he was under arrest. Matkin "advised him at that time that it was a detention." Deputy Matkin repeatedly asked Allen to identify himself, but he refused. Deputy Matkin detected the odor of an alcoholic beverage. "I did advise him that, that at this point during my line of questioning I was conducting an investigation and that he was obstructing that investigation." 3/3/08 Tr. at 11-12:1-8, 22:2-4, 27:14-17; Order Den. Mot. to Dismiss, FF 5, P. App. 11; *Allen*, ¶ 5, P. App. 3.

After warning Allen that he would be arrested if he persisted in refusing to provide his name, the deputy escorted him to his patrol car and conducted a pat-down search incident to arrest, removing a Leatherman[1] and keys from Allen's pocket. The deputy did not remove Allen's wallet because it was obvious that the item was a wallet rather than a weapon and the deputy did not believe he had authority "to remove a wallet that may contain something incriminating." 3/3/08 Tr. at 12:10-21, 22:12-18, 24:6-13. Allen has conceded that the investigation lasted only a matter of minutes. Appellant's Br. at 5.

While conducting the pat-down search for officer safety, Allen attempted to "hook" Deputy Matkin's leg with one of his legs – "a maneuver that is indicative of a pending assault or escape attempt." 3/3/08 Tr. at 12:19-25. Deputy Matkin then placed Allen in the patrol car, stating that the jail would find out who he was. Preoccupied with the suspect, Deputy Matkin asked another officer "to drive through the area and check the businesses and the cars in the area, to make sure that everything was okay." 3/3/08 Tr. at 13:6-17. The other officer did not find anything suspicious and Deputy Matkin did not discover any warrants or probation status or anything to explain Allen's behavior: "So at the end of it, it was kind of a

---

[1] A Leatherman is a multipurpose tool that contains, among other things, knife blades.

mystery as to why he was running." 3/3/08 Tr. at 13-14:9-14.

Jail personnel discovered that the man Deputy Matkin had arrested was Petitioner Josh A. Allen. Deputy Matkin charged Allen with misdemeanor obstructing a peace officer. 3/3/08 Tr. at 14:1-10. The notice to appear and complaint states: "Obstructing a Peace Officer: Fleeing From Deputy on Foot & Failing to Indentify Himself Upon Apprehension." Allen was 29 years old. Notice to Appear and Compl., R. App. at 3; Order Den. Mot. to Dismiss, FF 7, P. App. 12.

Deputy Matkin explained why he believed he needed to identify Allen:

> Let's say that a business was broken into down there. I had a person in that area and I stopped that person. Now, the person obviously was trying to evade me, to run from me, trying to escape the situation or the area. Now, I stopped that person and I can't identify him. So then I release him. And then ten minutes later I find that a business has been broken into and a car has been broken into in the immediate area. That again, goes back to why it was imperative that I obtain your ID.

3/3/03 Tr. at 29:15-25, 32-33; Order Den. Mot. to Dismiss, FF 6, P. App. 11. Allen's refusal to identify himself "kept . . . [Deputy Matkin] from pursuing the matter and he had to have other officers do that." 3/3/08 Tr. at 31:14-16.

Allen appended Deputy Matkin's police report to motions and pleadings he filed in justice and district court. The police report was consistent with Deputy Matkin's hearing testimony in district court. The report also reflects that Allen stated he was "out for a jog." Police Report at 1-2.

## I. JUSTICE COURT PROCEEDINGS

Having chosen to represent himself, Allen waived his right to a jury trial, stating "there are no factual issues to be decided by a jury[,]" and "a jury cannot decide legal questions[.]" 5/2/07 Motion to Waive Jury Trial. Allen's list of trial exhibits consisted of Deputy Matkin's police report, decisions of this Court, and Montana statutes. 5/16/07 Notice of Witnesses and Exhibits.

While claiming that "[a]ll factual issues equal no crime[,]" Allen asserted that he was "accustomed to keeping odd hours and jogging at night, specifically because it is cooler at night and there is less traffic on the road." On this March 2007 morning, however, he claimed that he decided to "walk and jog" home after 2 a.m. because he had consumed three beers and "the DUI limit of .08 BAC is extremely low and [he] did not want to take a chance receiving a DUI driving home." Though claiming that he wanted to avoid contact with and harassment by the police, Allen opted to "jog down the alley." 4/30/07 Answer & Demurrer at 2.

In a later motion to dismiss, Allen argued that he was relying upon decisions of the Supreme Court of the United States when he refused to identify himself, but he had only recently been made aware of *Hiibel*. 5/29/07 Motion to Dismiss at 3, R. App. 9. Thus, after reading *Hiibel*, Allen alleged for the first time that "he was also concerned that he could have had an arrest warrant for an unpaid speeding ticket[.]" 5/29/09 Motion to Dismiss at 2, R. App. 8. Allen's brief in support of his motion to dismiss consisted of attached statutes, decisions of this Court, and Deputy Matkin's police report. 5/29/09 Br. in Support.

Allen was convicted following a bench trial and given a suspended sentence with credit for time served. 10/10/07 Judgment. Allen appealed, exercising his statutory right to a trial de novo in district court. Mont. Code Ann. § 46-17-311(1).

## II. DISTRICT COURT PROCEEDINGS

In district court Allen once again waived his right to a jury trial, contending that "the alleged acts are not a crime," and, while there were "no relevant factual issues to be decided by a jury[,]" there were constitutional issues to be decided by a judge. D.C. Doc. 33, Waiver; D.C. Doc. 35, Omnibus Order.

Allen filed an answer and motion to dismiss similar to the one he had filed in justice court, reiterating that there were no factual issues to be resolved. D.C. Doc. 20, Answer at 1. He alleged that

in the past he "ha[d] been stopped, questioned, harassed and had I.D. or a name demanded of him while jogging at night, no less than 4 times." D.C. Doc. 20, Answer at 2. He argued that no evidence of a crime was discovered because "there was no crime . . . [he] was fleeing from. . . ." D.C. Doc. 20, Answer at 3. Indeed, Allen asserted that he did not tell Deputy Matkin he would not "incriminate" himself. Rather, he "simply stated to the officer he was exercising his rights." D.C. Doc. 54, Resp. to Pl.'s Resp. at 2. Allen contended that the investigative stop statute, Mont. Code Ann. § 46-5-401, was vague and ambiguous. D.C. Doc. 20, Answer at 4. Finally, Allen asserted that *Hiibel* was distinguishable because the officer in *Hiibel* had particularized suspicion of a specific crime. D.C. Doc. 20, Answer at 5.

Allen then filed a motion asking for a hearing to decide legal issues, noting that he had refused to enter a plea of not guilty because his conduct could not be a crime and that "[t]he issues that the defendant wants to argue are legal issues, not factual issues." D.C. Doc. 37, Motion at 1. While contending that he had a right not to reveal his name, Allen did "not dispute that the officer had both the right and duty to investigate any activity which the officer is concerned about potentially causing public harm." D.C. Doc. 54, Resp. to Pl.'s Resp. at 3.

At the hearing on Allen's motion to dismiss, addressing Allen's vagueness challenge to the investigative stop statute, the district court explained that the investigative stop statute is not a penal law.

3/3/08 Tr. at 41-42, 42:16-25. When the court asked whether Allen was claiming that the criminal statute was vague, Allen responded,

> I agree fully that the officer can ask whatever questions he wants and me not answering those may well cause him difficulty in an investigation. But my primary thrust of that is that my constitutional rights to remain silent, especially when I thought I was under arrest, in handcuffs and being concerned that anything that came out of my mouth might be incriminating.

3/3/08 Tr. at 55, 56:1-9.

Deputy Matkin testified at the hearing on Allen's motion to dismiss. Allen did not testify at the hearing or contend on the day of the hearing that he would not affirm to testify truthfully. After taking the matter under consideration, the trial judge issued findings of fact and conclusion of law denying Allen's motion to dismiss. Order Den. Mot. to Dismiss, P. App. at 9-17. The court concluded that the stop was supported by particularized suspicion and "[t]he running coupled with refusal to give a name after being told of the investigation, establish[ed] probable cause to charge the offense." The court rejected Allen's constitutional claims. P. App. at 14-17.

Consistent with his earlier hearing testimony, Deputy Matkin testified at trial regarding why he decided to stop, detain, and ultimately arrest and charge Allen with obstructing a peace officer. 3/27/09

Tr. at 5-22. Allen attempted to cross-examine Matkin regarding pretrial legal issues already decided, rather than factual matters bearing upon whether he knowingly obstructed an investigation. 3/27/09 Tr. at 22-23, 26-29. Allen then moved for a directed verdict, arguing that probable cause was lacking and that the prosecution failed "to prove that the police officer's need to investigate a crime overrides the Defendant's constitutional rights to remain silent." 3/27/09 Tr. at 28:11-14. Allen stated, "I don't argue that not giving my name might have obstructed Deputy Matkin, but again, here the issue at hand is whether my constitutional rights to remain silent are superior to that." 3/27/08 Tr. at 29:10-15. Allen conceded that Deputy Matkin believed he needed to conduct an investigation. 3/27/08 Tr. at 29:21-25.

The district court denied Allen's motion for a directed verdict, concluding that the prosecution had presented legally sufficient evidence. 3/27/08 Tr. at 34-35. Allen was then given the opportunity to give an opening statement: Allen cited "a couple experiences in the past," stated that he had read *Terry v. Ohio,* 392 U.S. 1 (1969), *Brown*, and *Kolender* prior to being stopped, and suggested he was concerned an arrest warrant had been issued for an unpaid speeding ticket. 3/27/08 Tr. at 36-38. Afterwards, Allen declined to testify because he would not affirm to testify truthfully, stating, "Well, I guess I'm not going to be able to testify, being affirming and swearing an oath are synonymous." 3/27/08 Tr. at 38:14-16, 39:9-11. Allen called the court's attention to

his notice that he would not swear or affirm to testify truthfully, which he had filed on the eve of the hearing on his motion to dismiss. Notice, P. App. 24-25. After being advised by the trial judge that Rule 603 of the Montana Rules of Evidence requires an "oath or affirmation administered in a form calculated to awaken the witness' conscience that impress the witness' mind with the duty to" testify truthfully, Allen stated that he would be unable to testify, citing his religious beliefs. 3/27/08 Tr. at 40-41.

After Allen declined to testify by affirmation, the trial judge stated that he had reviewed Allen's motion to dismiss, adding, "I will consider what you said before." When the judge invited Allen to provide additional factual reasons why he believed he was not guilty, Allen replied, "I didn't think we completely handled the legal questions." 3/27/08 Tr. at 43:1-10. Allen reiterated that his defense was legal in nature. 3/27/08 Tr. at 43:17-25.

Allen did not introduce evidence of an arrest warrant for supposedly failing to pay a speeding ticket or claim that he was innocent of an unresolved speeding violation if one existed.

The district court found that Allen knowingly obstructed a lawful police investigation. 3/27/08 Tr. at 50-51. The court deferred imposition of sentence, gave Allen credit for time in jail prior to release on bond, and stayed execution of the conditions of the sentence pending appeal. 3/27/08 Tr. at 53-55; Judgment, P. App. 18-19.

## III. MONTANA SUPREME COURT APPEAL

On direct appeal, Allen continued to expand upon his extra-record allegations and arguments, including alleging for the first time that he had read pre-*Hiibel* precedent after talking to a law professor friend. Appellant's Br. at 4. He alleged for the first time that he observed the patrol vehicle "rapidly decelerate and turn without a blinker." Appellant's Br. at 7. Allen also disclosed that he did not appreciate the significance of testifying at trial until after he had consulted with an attorney. Appellant's Br. at 24, R. App. 15.

The Montana Supreme Court affirmed the district court's determinations that Deputy Matkin had particularized suspicion to detain Allen and "that Allen's running from Deputy Matkin, coupled with his refusal to provide his name after being told of the investigation, provided probable cause to arrest and charge him with obstructing." *Allen*, ¶¶ 6, 10, P. App. 3-5. The Court concluded that the Fifth Amendment privilege against self-incrimination did not protect Allen from having to provide his name because Allen was not facing a "reasonable danger of incrimination" for purposes of *Hiibel*. Allen's suggestion that he would be arrested for an unpaid speeding ticket "was unsubstantiated, as a criminal history and warrants check ran on Allen after his arrest showed no outstanding warrants or criminal history." Thus, "the act of providing his name provided no reasonable danger to Allen that he would incriminate himself, nor would it furnish a link in a chain of evidence

which could be later used to prosecute him." *Allen*, ¶ 11 (*citing Hiibel*, 542 U.S. at 190), P. App. 5.

The Court concluded that Allen had failed to meet his burden of overcoming the presumption of constitutionality accorded Montana's obstructing statute, Mont. Code Ann. § 45-7-302. *Allen*, ¶ 13, P. App. 6-7. The Court also concluded that Allen had failed to meet his burden of proving that the affirmation requirement in Mont. R. Evid. 603 violated Allen's rights to equal protection and due process. *Allen*, ¶ 14, P. App. 7.

Allen filed a petition for rehearing, which the Court denied in a one-page order. 5/12/09 Order.

## IV. ALLEN'S PETITION FOR CERTIORARI

Although Allen does not ask this Court to review the Montana Supreme Court's determination that the decision to stop him was supported by particularized suspicion, more extra-record allegations have crept into Allen's petition in connection with the stop. First, Allen alleges for the first time here that the patrol vehicle's "turn signal was activated at the last second[.]" Pet. at 2. As discussed above, this contradicts Allen's assertion on direct appeal – itself never asserted in justice or district court – that Allen saw Deputy Matkin "rapidly decelerate and turn without a blinker." Appellant's Br. at 7. Second, Allen argues that he was heading in the same direction when stopped that he had been traveling when Deputy Matkin first saw him. Pet. at 2. This is misleading. As

discussed above, Allen was first observed walking in a southwesterly direction, after which Allen ducked down behind a hedgerow, ran in full flight around a building (east, south, and west), and continued running as hard as he could down an alley and across a street prior to being stopped (westbound) on another city block. Allen also argues for the first time that the trial and appellate courts should have explored ways he might have testified at trial.

## SUMMARY OF REASONS TO DENY A WRIT OF CERTIORARI

1. This case is indistinguishable from *Hiibel*, which required the Montana Supreme Court to analyze two questions in determining whether Deputy Matkin's request for identification violated Allen's constitutional rights. First, *Hiibel* requires that the encounter between the officer and the suspect satisfy the Fourth Amendment, i.e., that there be a good *Terry* stop. Both the trial and the appellate court found that Deputy Matkin had particularized suspicion to justify stopping Allen. Allen does not ask this Court to review that conclusion.

The only issue remaining is whether the request for identification, in the face of a penal sanction, gave rise to a real or reasonable danger of incrimination for purposes of the Fifth Amendment. It clearly did not. Allen has maintained that he was just out for an innocent 2:15 a.m. jog, or in the alternative, that he

was walking and jogging home out of concern that his blood alcohol level would make it illegal for him to drive home; and, no evidence of criminal wrongdoing was discovered. Further, Allen's claim that he was afraid there might be a possible warrant for perhaps failing to pay a speeding ticket was unsubstantiated because a criminal history and warrants check revealed that no such warrant existed.

The only material respect in which his case differs from *Hiibel* is that Allen's own allegations demonstrate the insubstantiality of Allen's claim. Alleging a history of demands for identification in connection with prior 2 a.m. jogs, Allen provoked a stop, intending to refuse to identify himself no matter what. There is a marked difference between a legitimate fear of incrimination and a man playing games with the police. Allen's case belongs in the latter category.

2. The Montana Supreme Court properly concluded that Allen had failed to prove that he should be completely excused from any sort of affirmation requirement. Even at this juncture, Allen does not tell this Court how he might have been able to testify consistent with his purported religious beliefs. Moreover, Allen's defense was legal rather than factual. These circumstances distinguish this case from *Gordon v. Idaho*, 778 F.2d 1397 (9th Cir. 1985), which is not controlling. Thus, a writ should not be granted to review the Montana Supreme Court's determination that Allen failed to establish a violation of equal protection or due process.

3. Finally, the Montana Supreme Court's handling of Allen's vagueness challenge does not merit review. While Allen's self-incrimination claim was insubstantial, Allen had fair notice that he could not knowingly hinder or impede a concededly lawful *Terry* stop, specifically including a statutorily authorized request that he identify himself. Moreover, Mont. Code Ann. § 45-7-302, clearly applies when a person – having predetermined that he will refuse to identify himself – baits law enforcement into making an investigative stop.

## I. THE MONTANA SUPREME COURT'S DECISION COMPORTS WITH *HIIBEL*.

### A. The Court Correctly Concluded That Requiring Allen to Provide His Name Did Not Involve a Real or Reasonable Danger of Incrimination.

Allen does not challenge whether particularized or reasonable suspicion existed. Thus, like the defendant in *Hiibel*, 542 U.S. at 184, and unlike the situation in *Brown v. Texas*, 443 U.S. at 51-52, the effort to obtain identification occurred in the context of a lawful investigative stop. The investigation, however, did not uncover evidence that Allen was fleeing from or involved in a crime that night. Indeed, rather than maintaining silence, Allen has stated again-and-again that he was not engaged in criminal wrongdoing. Accordingly, the prospect of being required to provide his name did not implicate a real or

reasonable danger of incrimination with respect to Allen's pre-stop behavior.

Turning to Allen's claim that he was afraid of a possible arrest warrant for perhaps failing to pay a speeding ticket, the claim is both dubious and insubstantial. The claim was first raised only after Allen admitted having recently become aware of *Hiibel*. Allen's post-stop reading of *Hiibel* presumably included the caveat in *Hiibel* that "a case may arise where this is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense." 542 U.S. at 191. In any event, the claim was insubstantial because the investigation revealed that there were no warrants, criminal history, or anything explaining Allen's pre-stop behavior. Requiring Allen to provide his name under these circumstances did not involve a genuine or reasonable danger of incrimination.

Furthermore, under Montana law the failure to pay a speeding ticket is treated as a civil contempt. *See* Mont. Code Ann. § 61-8-711(3). *See also* Mont. Code Ann. § 61-8-725(2) (speeding, except in the case of school zones and other special restrictions, is not considered a misdemeanor offense and may not be charged against a person's driving record unless the speed limit is exceeded by ten miles an hour in the daytime and five miles an hour at night). Allen's assertion that he failed to pay a ticket presupposed that he was guilty or had already been convicted in person or in absentia. Thus, even if Allen had failed

to pay a prior speeding ticket, he could not have reasonably believed that his name could be used in a future criminal prosecution. *See Hiibel*, 542 U.S. at 190; *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Allen's name was not a link to an unsolved speeding violation.

Allen now argues that it was absurd for the Montana Supreme Court to suggest that Allen had to prove that a warrant or unpaid speeding ticket existed. Pet. at 7. What is actually absurd is Allen's raising the issue of a mythical warrant after reading *Hiibel* and then faulting the Montana Supreme Court for pointing out that his assertion was unsubstantiated. And the Court did not hold, as Petitioner suggests, that Allen was required to prove a danger of incrimination. The Court rather followed this Court's teachings in *Hiibel* by seeking to determine whether in this context Allen's name would be incriminating information. The only evidence brought forward to support such a conclusion was Allen's self-serving and unsupported allegation. Anyone can make an unsubstantiated claim that there might be a possible warrant for failing to pay a traffic fine. A person's "say-so," however, is insufficient in itself to establish a danger of self-incrimination. *Cf. Hoffman v. United States*, 341 U.S. 479, 486 (1951) (holding that a widely-reputed crime boss with a long criminal history faced a real danger of conviction of a federal crime in connection with a federal grand jury investigation of racketeering).

"Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." *Hiibel*, 542 U.S. at 191. "Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." *Id.* By referencing a possible warrant, Allen was suggesting that the danger of incrimination he faced was real or more significant than the danger in *Hiibel*. In truth, the danger of self-incrimination was less substantial than in *Hiibel*. Unlike Allen, Hiibel did not maintain that his pre-stop behavior was wholly innocent. Hiibel also did not make a demonstrably unsubstantiated claim regarding a warrant for supposedly failing to pay a speeding ticket. Allen's unsupported say-so was not an unusual circumstance suggesting a genuine danger of incrimination. *Hoffman*, 341 U.S. at 486.

The Montana Supreme Court correctly applied *Hiibel* when it decided that "the disclosure of Allen's name to Deputy Matkin, under the circumstances of this case, would not have been incriminating." *Allen*, ¶ 11, P. App. 6. Because the Court's decision is consistent with *Hiibel*, Allen's petition for a writ of certiorari to review that determination should be denied.

### B. Citizens Who Knowingly Provoke Law-Enforcement Investigations, Intending to Refuse to Identify Themselves, Are Not a Burgeoning National Problem About Which State and Federal Courts Need Guidance.

The Petition does not identify a split of authority regarding the application of *Hiibel*. Sup. Ct. R. 10. Indeed, if this Court were inclined to address the application or scope of the *Hiibel* holding, the time to do so is not ripe. A conflict has not arisen. The small number of cases in which *Hiibel* has been distinguished have involved consensual encounters between citizens and the police or cases in which reasonable cause was absent. *See, e.g., United States v. Henderson*, 463 F.3d 27, 47 (1st Cir. 2006); *Golphin v. State*, 945 So. 2d 1174, 1198-99 (Fla. 2006).

Moreover, this case is one-of-a-kind. These facts and Allen's shifting allegations are unique, and are unlikely to be repeated in the state and federal courts. Even if the Court were concerned about a perceived lack of clarity in the principles announced in *Hiibel*, this case is *sui generis*, and for that reason provides an inappropriate vehicle on which to attempt to clarify the law.

### C. Placing Allen in Handcuffs on the Ground Did Not Change the *Terry* Stop Into an Arrest. Allen Was Not Under Arrest and Asking Him to Provide His Name Was Not Reasonably Likely to Elicit an Incriminating Response in Any Event.

The Petition does not ask this Court to decide whether Deputy Matkin's detention of Allen constituted an arrest without probable cause, but Allen does make that argument in the body of the Petition. Whether properly presented or not, the claim is insubstantial.

After aggressively fleeing from a patrol vehicle after 2 a.m., Allen was handcuffed for officer safety. The officer had no idea who Allen was, why he was behaving so suspiciously, and Allen was obviously not just out for a jog. Officers can ask a moderate number of questions without a brief investigative or *Terry*-type stop becoming a custodial arrest situation requiring *Miranda* warnings. *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984). Here, the investigation necessarily focused on obtaining Allen's name, which "has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop." *Hiibel*, at 188. It also does not change the duration or location of a stop. *Id.* Allen has conceded that the stop lasted a matter of minutes.

Only after Allen had repeatedly declined to provide his name was he removed to the patrol vehicle, patted down for weapons, taken to the jail,

and charged with obstructing a peace officer – prior to which Allen was not subjected to restraints comparable to a formal arrest. *See Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (plurality) (after Royer's luggage, driver's license, and plane ticket were seized, he was moved from a concourse to a small police room and questioned by two officers regarding narcotics trafficking); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (teenager picked up and taken to police station for questioning). If anything, Allen complicated the investigation and transformed it into an eventual arrest by refusing to give his name, knowing that his identity would be ascertained during the booking process. *Cf. United States v. Sharpe*, 470 U.S. 675, 688 (1985) (emphasizing that the defendant's own actions prolonged the investigation).

Viewing the situation as a *Terry* stop which evolved into an arrest, the Montana Supreme Court did not specifically address Allen's assertion that he was under arrest immediately upon being handcuffed. Allen asks this Court to grant a writ of certiorari to lay down a bright-line rule that handcuffing a suspect automatically converts a *Terry* detention into a full-blown arrest. This Court, however, has declined to lay down a bright-line rule for when an investigative detention becomes an arrest, recognizing that "commonsense and ordinary human experience must govern over rigid criteria." *Sharpe*, 470 U.S. at 688. There is no "litmus-paper test" for determining when a stop has transcended Fourth Amendment reasonableness. *Royer*, 460 at 506-07. "[P]olice officers are

often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving[.]" *Graham v. Connor*, 490 U.S. 386, 397 (1989). *Cf., e.g., United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005) (reasonable to handcuff for officer safety when the suspect had attempted to flee). *United States v. Dykes*, 406 F.3d 717, 720 (D.C. Cir. 2005) (no custodial arrest although officers tackled and handcuffed fleeing suspect).

Furthermore, assuming for the sake of argument that Allen was in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), Allen was not interrogated. As discussed above, asking Allen to provide his name was not reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980). And while Allen was also asked why he was running, Allen has not objected to being asked that question: in trial court, on direct appeal, and here, Allen has expanded upon the theme that he was just out for an innocent late-night jog. Instead, Allen's arguments have focused on whether he could be required to provide his name.

## II. THE COURT SHOULD NOT GRANT THE WRIT TO REVIEW THE MONTANA SUPREME COURT'S DETERMINATION REGARDING ALLEN'S REFUSAL TO AFFIRM TO TELL THE TRUTH.

On the Friday before the scheduled Monday hearing on his motion to dismiss, Allen filed notice that he would not swear or affirm to testify truthfully, referring, without citation, to *Gordon v. Idaho,* 778 F.2d 1397 (9th Cir. 1985), and quoting biblical passages. The notice stated the district court should "accept this as dicta." Notice, P. App. 24-25. Allen did not raise the issue at the hearing on his motion to dismiss. The issue did not come up until trial, when Allen decided that he would not testify.

The Montana Court's treatment of the issue did not conflict with *Gordon*, as Allen suggests, because that case is easily distinguished. Unlike the plaintiff in *Gordon*, Allen sought to completely avoid any sort of affirmation requirement. Allen did not argue, as he does for the first time here, (Pet. at 14), that the district court should have investigated ways for him to testify consistent with his purported religious beliefs. Further, the plaintiff in *Gordon* represented that he could affirm in the following manner: "I understand that I must tell the truth. I agree to testify under penalty of perjury. I understand that if I testify falsely I may be subject to criminal prosecution." *Gordon*, 778 F.2d at 1401. In contrast, on appeal Allen argued that he would not affirm to tell the truth and that he would not do "anything more."

Appellant's Br. at 23-34, R. App. 14-15. Under these circumstances, the Montana Supreme Court properly concluded that Allen had "provided no legal authority or argument to support his contention that he should be *completely excused* from the oath or affirmation requirement in M.R. Evid. 603 prior to giving testimony in court." *Allen*, ¶ 14 (emphasis added), P. App. 7.

The Court cited *Gordon*, which discussed the identical federal requirement of an oath or affirmation "calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully. *Allen*, ¶ 14, P. App. 7. The Court appreciated that *Gordon* does not hold that a witness may avoid affirming altogether. Even at this late stage, Allen fails to apprise this Court how Allen's conscience could have been awakened and his mind impressed with the duty to testify truthfully without violating his alleged religious beliefs.

Finally, after Allen declined to testify, the trial judge asked Allen if there were any "factual things" Allen believed were lacking in the State's case. Allen replied, "I didn't think we completely handled the legal questions." 3/27/09 Tr. at 43:1-10. Allen has conceded that Deputy Matkin had to investigate him and that he impeded or hindered the investigation by refusing to give his name. Allen's legal defense, however, was that his Fifth Amendment right to remain anonymous was superior to the officer's authority. Under these circumstances, Allen's testifying regarding his superseding legal defense would not have

changed the outcome because Allen did not have a legal right to withhold his name in connection with a lawful investigation he invited.

Thus, the Court should not grant a writ of certiorari to review the Montana Supreme Court's determination that Allen had failed to prove a violation of equal protection or due process.

## III. ALLEN FAILED TO CARRY HIS BURDEN OF PROVING THAT MONTANA'S OBSTRUCTING A PEACE OFFICER STATUTE IS UNCONSTITUTIONALLY VAGUE.

Allen makes a facial vagueness challenge to Mont. Code Ann. § 45-7-302. Pet. at 11-12. To prevail, Allen must show that the statute is "impermissibly vague in all of its applications[,]"and that "'no standard of conduct is specified at all.'" *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 n.7 (1982) (citation omitted).

Allen's vagueness challenge fails because he acknowledged that his conduct might obstruct Deputy Matkin's investigation, stating "I don't argue that not giving my name might have obstructed Deputy Matkin, but again, here the issue at hand is whether my constitutional rights to remain silent are superior to that." 3/27/08 Tr. at 29:10-15. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 495. And even if the effect of the law on

the hypothetical person of ordinary intelligence were pertinent, Montana's Obstruction law punishes an obstruction in the form of a refusal to identify only when the act is committed "knowingly." "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Hoffman Estates*, 455 U.S. at 499.

Allen relies on *Brown* and *Kolender,* both of which are distinguishable. *Brown*, as this Court noted in *Hiibel*, involved a request for identification in the absence of particularized suspicion. *Hiibel*, 542 U.S. at 184; *Brown*, 443 U.S. at 51-52. While the law enforcement contact in *Brown* was unlawful, Allen has not asked this Court to review the Montana Supreme Court's determination that Allen was lawfully stopped. Furthermore, this Court did not address whether the Texas statute in *Brown* was unconstitutionally vague.

*Kolender* involved a California vagrancy statute which gave police officers unfettered discretion to determine whether persons provided "reliable and credible" identification whenever an officer determined a person was moving from one place to another for no discernable reason. The statute criminalized as disorderly conduct an individual's right to freely move about. *Kolender*, 461 U.S. at 360. *See also Papachristou v. City of Jacksonville*, 405 U.S. 156 n.1 (1972) (striking down an antiquated vagrancy ordinance which criminalized rogues, vagabonds, common night walkers, wanderers, strollers, habitual loafers, and vagrants). Montana's Investigatory Stop and

Obstruction statutes suffer from no such infirmity. The Stop statute requires particularized suspicion before the detention can occur. The Obstruction statute confines enforcement only to cases in which an officer is lawfully engaged in an investigation and the suspect fails to identify knowing that the action will likely impede the investigation.

Allen argues that the investigative stop statute at issue in *Hiibel* uses the word "demand," while Montana's investigative stop statute employs the word "request." These language differences are inconsequential because the request for identification is clearly a lawful request, Mont. Code Ann. § 46-5-401, and citizens may not knowingly impede or hinder the obtaining of such neutral information for purposes of Mont. Code Ann. § 45-7-302. The states are not required to follow a specific formula in order to require identification. As a matter of state law, the Montana Supreme Court has determined that citizens are subject to criminal sanction for knowingly hindering or obstructing lawful identification efforts. Montana's investigative stop and obstructing statutes do not need to mirror Nevada law. In Montana, as in Nevada, "[t]he threat of criminal sanction helps ensure that the request does not become a legal nullity." *Cf. Hiibel*, 542 U.S. at 188.

In the context of an investigative stop there are a number of things an officer may lawfully require a person to do, including providing identification, staying in a particular location or vehicle, moving to another location or exiting a vehicle, or putting his

hands behind his back. Under Montana law a suspect's noncompliance may provide the basis for an arrest or conviction for obstructing a peace officer if the suspect knowingly impairs, impedes, or hinders an investigation. Montana law puts citizens on notice that "the enforcement of the criminal law" and "preservation of the peace" for purposes of § 45-7-302, include efforts to identify persons lawfully stopped pursuant to § 46-5-401. R. App. 1-2.

Allen's facial vagueness challenge is insubstantial. It does not warrant this Court's review.

## CONCLUSION

For the foregoing reasons, Allen's petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVE BULLOCK
Attorney General of Montana
CHRIS D. TWEETEN
Chief Civil Counsel
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

MARK W. MATTIOLI
Appellate Bureau Chief
*Counsel of Record*

December 2009

# APPENDIX

**46-5-401. Investigative stop and frisk.** (1) In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. If the stop is for a violation under Title 61, unless emergency circumstances exist or the officer has reasonable cause to fear for the officer's own safety or for the public's safety, the officer shall as promptly as possible inform the person of the reason for the stop.

(2) A peace officer who has lawfully stopped a person or vehicle under this section may:

(a) request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license and the vehicle's registration and proof of insurance; and

(b) frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person present. The officer may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe that the object is a deadly weapon until the completion of the stop, at which time the officer shall either

immediately return the object, if legally possessed, or arrest the person.

(3) A peace officer acting under subsection (2) while the peace officer is not in uniform shall inform the person as promptly as possible under the circumstances and in any case before questioning the person that the officer is a peace officer.

**45-7-302. Obstructing peace officer or other public servant.** (1) A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

App. 4

#07-4390 07HL-144-AR

COURT COPY | NOTICE TO APPEAR AND COMPLAINT | ISSUED BY HILL COUNTY SHERIFF'S DEPT. | C12A | 13779

☒ STATE OF MONTANA )
☐ CITY OF _____ ) vs.
☒ HILL CO. )

**THE DEFENDANT IS HEREBY GIVEN NOTICE TO APPEAR IN**

☒ JUSTICE ☐ CITY ☐ YOUTH ☐

COURT OF T STOPPA DEPT NO. 455

COUNTY OF HILL

LOCATED AT COURTHOUSE 2ND FLOOR

HAVRE MONTANA

ON OR BEFORE 10:00 [AM] PM

THE 26 DAY OF MAR 2007

TO ANSWER THIS CHARGE

ON THIS ____ DAY OF _____
THIS COMPLAINT WAS PRESENTED TO ME AND THE OFFICER UNDER OATH SWORE THAT THE CHARGES ARE TRUE.

SIGNATURE OF JUDGE OR NOTARY

BOND $285.00

**DEFENDANT NAME**

| FIRST | MIDDLE | LAST |
|---|---|---|
| JOSH | ABEL | ALLEN |

STREET: [Home Address Omitted]

VEHICLE LICENSE NO.

| CITY | STATE | ZIP | LIC. STATE | MO. | YR. |
|---|---|---|---|---|---|
| MARTIN CITY | MT | 59926 | | | |

| SEX | WT. | HT. | EYES | HAIR | DATE OF BIRTH | MO. | DAY | YEAR |
|---|---|---|---|---|---|---|---|---|
| M | 170 | 508 | BLUE | BRO | | [Date Of Birth Omitted] | | |

VEHICLE MAKE

| DVL NO. | DVL STATE | DVL EXP. YEAR | VEHICLE YR. | VEHICLE COLOR |
|---|---|---|---|---|
| 07027197841 26 | MT | 2007 | | |

| HOME PHONE | EMPLOYER | BUSINESS PHONE |
|---|---|---|
| | | |

VEHICLE TYPE
☐ CAR ☐ TRUCK
☐ PICKUP ☐ TRU-TRLR
☐ MOTORCYCLE ☐ CV
☐ _____ ☐ CVE

THE ABOVE NAMED DEFENDANT IS CHARGED WITH VIOLATING
☒ MONTANA CODE ☐ CITY CODE ☐ COUNTY ORDINANCE
☐ _____ SECTION NO. 45-7-302

ON THE 22 DAY OF MARCH 2007 AT 2215 MILITARY TIME

UNIFORM VIOLATION CODE

DOCKET NUMBER TK07-5003

IN THAT SAID DEFENDANT DID KNOWINGLY OR PURPOSELY OR NEGLIGENTLY
OBSTRUCTING A PEACE OFFICER: FLEEING FROM DEPUTY ON FOOT & FAILING TO IDENTIFY HIMSELF UPON APPREHENSION

NAMELY AT LOCATION 400 blk of 1st St W

LOCATION CODE H A V R E

IF CHECKED ☒ PERSONAL APPEARANCE IN COURT REQUIRED

☒ FAILURE TO APPEAR MAY RESULT IN A SUSPENSION OF YOUR DRIVER'S LICENSE OR PRIVILEGE TO DRIVE

☐ BA TEST GIVEN
☐ ACCIDENT
RADAR
UNIT NO. _____

EMP. ID NO. 12-7 s/ [Illegible]
DETACH NO. 12-1 SIGNATURE OF OFFICER

RECEIVED
$ JAILED
AS APPEARANCE BOND

Josh A. Allen
P.O. box 1621
Havre, MT 59501
(406) 265-2614

IN THE JUSTICE COURT OF HILL COUNTY,
CITY OF HAVRE, STATE OF MONTANA,
BEFORE TERRY L. STOPPA,
JUSTICE OF THE PEACE

| | |
|---|---|
| THE STATE OF MONTANA<br>PLAINTIFF,<br>VS<br>Josh A. Alien<br>DEFENDANT | CAUSE NO<br>TK07-503<br>MOTION TO DISMISS; FOR STATE'S FAILURE TO PROVE PRIMA FACIA [sic] CASE, with brief in support |

COMES NOW the Defendant, Josh A. Allen, to enter a MOTION TO DISMISS to the charge of Obstructing a Peace Officer or Other Public Servant MCA 45-7-302 FOR STATE'S FAILURE TO PROVE IT'S PRIMA FACIA [sic] CASE, with brief in support, to wit:

Defendant filed an ANSWER AND DEMURR TO COMPLAINT (converted by the Justice Court into a motion to suppress), bringing up many relevant legal issues. The STATE failed to respond on a point by point basis to these issues. In law, failure to respond timely means that the opposing side must agree. The STATE failed to prove that the Defendant's actions of "Fleeing" and refusing to identify himself constitute a

crime, according to the factual events in the police report, and for legal reasons supported by the U.S. Constitution, MCA and U.S. Supreme Court Decisions of similar cases.

The charges of Obstructing a Peace Officer or Other Public Servant, MCA 45-7-302, should be dismissed for the following legal reasons, the Defendant's alleged act of "Fleeing" and the act of refusing to identify himself do not constitute a crime in this case and are protected by the U.S. constitution and similar cases decided by the U.S. Supreme Court. The U.S. Constitution and previous case law from the U.S. Supreme Court supersede any conflicting law in the Montana Code Annotated.

The Defendant was relying in good faith on his understanding of the U.S. Constitution and U.S. Supreme Court eases pertaining to similar matters, thus one element required of a crime, that of intent was not present in this case.

The first issue is the STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS, (motion to suppress originally titled ANSWER AND DEMURR TO COMPLAINT).

The State failed to show that the first alleged act in the charge of Obstructing a Police Officer or Other Public Servant, "Fleeing" was a crime. The State also failed to show in the Motion for Discovery the specific law that makes avoiding or going in another direction from a police officer a crime. Please see police report in attached brief, because officer admits that when he

turned his siren on, making Defendant aware that he was pursuing him, defendant stopped immediately, so the Legal question arises: Is it a crime to walk or run in another direction from a police officer, when no crime has been committed, when he is not pursuing you at that point in time? The State failed to show what law makes this a crime.

The next act is Defendant refusing to identify himself. The State replies with MCA 46-5-401. INVESTIGATIVE STOP AND FRISK as the law that required the Defendant to identify himself: please see a copy of MCA 46-5-104 in attached brief.

The Defendant states that MCA 46-5-104 does not apply in this case for legal reasons involving Constitutional Rights, U.S. Supreme Court decisions, the Montana Code Annotated and the actions of Officer Matkin.

When the police car pulled up behind the Defendant, Officer Cory Matkin got out of the car and ordered the Defendant to the ground. The Defendant complied and was immediately placed in handcuffs, before being asked his name, even thought no crime was observed by Officer Matkin. Please see the Police Report in attached brief.

The above actions of Officer Matkin, especially being placed in handcuffs, constitutes an arrest under MCA 46-4-104, even though an arrest wasn't verbally declared. Please see MCA 46-4-104 in the attached brief. The Defendant thought he was under arrest at this point in time, and acted accordingly. A normal

person on the street would also conclude that being placed in handcuffs constitutes an arrest. Please note in State's Response to Defendant's "motion to suppress, that these facts, and issues of law are left out.

Since defendant was arrested immediately, before being asked his name, this triggered the Defendant's MIRANDA RIGHT to remain silent under MIRANDA v. ARIZONA.

Defendant also was concerned that he could have had an arrest warrant for an unpaid speeding ticket, and that giving his name in this instance would be incriminating by allowing police to see the warrant, thus he was exercising his right to silence under the Fifth Amendment, and MIRANDA v. ARIZONA.

Please note that under the U.S. Supreme Court decisions "Where fundamental rights under the constitution are involved, there can be no rulemaking or legislation which can abrogate them." MIRANDA v. ARIZONA 384 U.S. 436. And "The claim and exercise of a constitutional right cannot be converted into a crime." MILLER v. U.S. 230 F at 489.

Thus due to the arrest of the Defendant and the rights secured under the U.S. Constitution, and U.S. Supreme Court case law, MCA 46-5-401. Investigative stop and frisk does not apply in this case. This is the foremost reason that the charges should be dismissed. The Defendant raised this line of argument and the State failed to respond, thus they must agree.

Next there are U.S. Supreme Court cases that override the identification requirement of MCA 46-5-401. Investigative stop and frisk, and make the identification portion of the statute inapplicable in these circumstances, notwithstanding Defendant's arrest. Please see the U.S. Supreme Court Decision in attached brief titled U.S. Supreme Court, BROWN v. TEXAS, 443 U.S. 47 (1979). In this case the defendant, Brown was cited for failing to identify himself, even though no crime was witnessed by the police, and his conviction was overturned. The U.S. Supreme court decision in William Kolender v. Edward Lawson, (461. U.S. 352 1983) also validates my argument with a very similar case to that of BROWN v. TEXAS, please see the ease in attached legal brief. In this instance, Officer Matkin admits that no evidence of crime was found (defendant is thankful the police were honorable and didn't create any to frame him.).

The Defendant recently became aware of HIIBEL v. NEVADA, in which the U.S. Supreme Court ruled that the person in question had to supply I.D. when demanded by the police officer, however the circumstances in this case are different from those in BROWN v. TEXAS, and KOLENDER v. LAWSON. The police weren't investigating a crime in BROWN v. TEXAS, and KOLENDER v. LAWSON, but they were investigating a crime in HIIBEL v. NEVADA. In this instance, the Terry stop yielded no factual evidence of a crime, so Officer Matkin resorted in frustration to arresting Defendant for refusing to identify himself.

So the legal issue arises, is it a crime to refuse to identify yourself in the investigation of a non crime? HIIBEL also raises the question of the right to refuse to identify yourself if your name could be the link in a chain of evidence linking you to a separate crime. Please see the case of HIIBEL v. NEVADA in attached brief.

Next the Defendant raises the issue of intent, as there can be no crime in this case without the element of intent. Under MCA 45-2-103. General requirements of criminal act and mental state "(6) A person's reasonable belief that the person's conduct does not constitute an offense is a defense if:

(b) the person acts in reliance upon a statute that later is determined to be invalid;

(c) the person acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed;" It should be obvious that reliance on U.S. Supreme Court Decisions and the U.S. Constitution more that [sic] fulfill this requirement, as these override the Montana Supreme Court and U.S. appellate courts. As stated previously, the Defendant was relying on his Miranda rights and U.S. Supreme Court decisions, thus Defendant meets this criteria under MCA 45-2-103.

Now I would like to proceed to the last reason for entering a MOTION TO DISMISS to the charges of Obstructing a Peace Officer or Other Public Servant: That the charge was merely an act of frustration on

the part of deputy Matkin, who lacking any cause of action against the Defendant, resorted, in desperation to arrest on this frivolous charge. The defendant could not have obstructed, because by definition obstruction is a third party act. Deputy Matkin was not dealing with a third party, just the Defendant. The Defendant was not obstructing Deputy Matkin from any action that involved a third party, just exercising his own constitutional rights.

## CONCLUSION

It should be obvious to the learned court that this person did not obstruct an officer as the defendant was, in fact, arrested and had the right to remain silent. Defendant was merely exercising his rights under the Constitution of the United States and relying upon decisions of the U.S. Supreme Court when he refused to identify himself to the arresting officer and, therefore, was acting in good faith and cannot be guilty of any crime. In the Interest of Justice, and maintaining Judicial Economy, the Defendant respectfully requests that these charges be dismissed, and we can all walk away friends from the matter.

Dated this 29 day of May 2007

Respectfully Submitted,

/s/ Josh Allen pro se

## CERTIFICATE OF SERVICE

I, the Undersigned, do hereby certify that I did deliver a true and correct copy of the foregoing document, MOTION TO DISMISS, on this 29 day of MAY, 2007 either by hand or depositing a copy thereof in the United States Mail, postage prepaid, in and envelope addressed to:

✓ HILL COUNTY JUSTICE COURT,

HAVRE, MT

✓ STEPHEN GANNON, HILL COUNTY

PROSECUTOR, HAVRE, MT

/s/ Josh Allen
Signature

CASE NO: DA 08-0249

IN THE SUPREME COURT OF THE
STATE OF MONTANA

| | | |
|---|---|---|
| STATE OF MONTANA,<br>Plaintiff,<br>Vs.<br>JOSH A. ALLEN,<br>Defendant. | ) | District Court Case<br>No: DC-07-110 |

APPELLATE BRIEF OF APPELLANT JOSH A. ALLEN
On Appeal from the District Court of the
Twelfth Judicial District of the State of Montana,
Hill County, The Honorable David G.Rice presiding.

APPEARANCES BY:

Josh A. Allen
P.O. Box 1621
Havre, MT 59501
(406)-265-2614
Cell (406)-399-0326
Pro Se, Attorney for Self

Lindsay A. Osbourne, Deputy
Hill County Courthouse
Havre, MT 59501
(406)-265-5481, Ext. 211
Attorney for Plaintiff

* * *

M.C.A.46-5-401 as they are being combined against him. The Defendant would ask this Court to look at all of U.S. Supreme Court case law mentioned thus far and apply it to protect Defendant's rights and reach the conclusion that no crime was committed.

4. Next the Defendant would like to bring up the massive denial of equal protection and due process that the District Court imposed upon Defendant, and the religious discrimination that went along with it. Defendant doesn't believe that the District Court did this with malice or intent, but that it was done nonetheless (Trial record page 38-41). Defendant, in accordance with his truly and sincerely held religious beliefs, doesn't swear, take oaths, or affirm. Defendant put in a NOTICE OF REFUSAL TO SWEAR OR TAKE AN OATH (document 52.0) on 2/29/07 almost one month in advance of the trial. Defendant cites two biblical verses in support of his beliefs: James, 5:12 "But above all, my brethren, do not swear, either by heaven or earth, or with any other oath, but let your yes be yes and your no be no, that you may not fall under condemnation." Matthew 5:33-5:37 "Again you have heard that is [sic] was said of the men of old, 'you shall not swear falsely, but shall perform to the Lord what you have sworn.' But I say to you, do not swear at all, either by heaven, for it is the throne of God, or by earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for you cannot make one hair white or black. Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil." Defendant believes that this means what it says and that to affirm falls into the category of "anything more". Defendant also believes that to affirm is synonymous with taking an oath or swearing. The 9th Federal Circuit court of Appeals agrees with this in the case of *Gordon v. Idaho*, 778 F2d 1397. Gordon

v. Idaho is directly on point here, because the exact same argument is made and the court agrees. During the trial, after Defendant refuses to take the oath, Osbourne tries to claim that the Defendant is wrong and that this issue has already been decided by the Supreme Court, yet Osbourne can cite no case to back up her claim. Regardless, Defendant would like to pose the question; who is a prosecutor for the State to tell him what his religious beliefs are under the 1st amendment? Does a State Prosecutor have the Authority to decide people's religious beliefs? Defendant thinks not. At the time of the trial the defendant didn't know if this denial of due process would have substantial impact on the outcome, since Defendant's defense is primarily legal and not factual. However after consulting with legal counsel Defendant submits that the "devil is in the details". Those details, had the defendant been allowed to testify on his own behalf could have substantially shifted the legal merits of the ease with the contested issues of fact. Defendant would ask the Court to reverse the District Court's verdict just on the basis that he was denied equal protection and due

* * *